

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DANNY ANGELO LUNA,

Petitioner

v.

J. ENGLEMAN, Warden,

Respondent.

Case No. 2:22-cv-02627-JWH (GJS)

ORDER DISMISSING PETITION  
WITHOUT PREJUDICE

Petitioner is a federal prisoner currently incarcerated within this District at FCI-Terminal Island. The Clerk's Office received a putative 28 U.S.C. § 2241 petition from him on April 20, 2022, which thereafter was filed and assigned to the undersigned (Dkt. 1, "Petition"). The Court has screened the Petition<sup>1</sup> and considered Petitioner's allegations and claims carefully. Based on its review, the Court concludes that summary dismissal of this action, without prejudice, is required, for the reasons below.

### BACKGROUND

Pursuant to Rule 201 of the Federal Rules of Evidence, the Court takes judicial notice of the federal dockets and filings available through the PACER system. These records show that in Case No. 1:167-cr-00201-DAD-BLM in the United States District Court for the Eastern District of California (the "Sentencing Court"), Petitioner was charged with multiple drug violation counts. Following a guilty plea to two counts, on October 11, 2018, Petitioner was convicted and sentenced to 157 months in state prison.

Petitioner did not appeal the above conviction or sentence. On February 7, 2022, he filed a pro se motion for compassionate release under 18 U.S.C. § 3582(c)(1)(A)(i) in the Sentencing Court. The motion is on a check the box form, but Petitioner did handwrite in, as the basis for his request, that he is extremely overweight, is diabetic, has high blood pressure, has PTSD, is not receiving any

---

<sup>1</sup> Habeas petitions brought pursuant to Section 2241 may be subjected to the same screening requirements that apply to habeas petitions brought pursuant to 28 U.S.C. § 2254. *See* Rules 1(b) and 4 of the Rules Governing Section 2254 Cases in the United States District Courts, 28 U.S.C. foll. § 2254 (a district court may "apply any or all of these rules" to any habeas petition, and mandating that a district court dismiss a petition without ordering a responsive pleading where "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief"); *see also Bostic v. Carlson*, 884 F.2d 1267, 1269-70 (9th Cir. 1989) (affirming district court's dismissal of a Section 2241 petition under Habeas Rules 1(b) and 4); Local Rule 72-3.2 (authorizing magistrate judge to prepare for district judge proposed order for summary dismissal and proposed judgment if it plainly appears from the face of the habeas petition that the petitioner is not entitled to relief).

1 medical or mental health treatment, and is not receiving any treatment for his long  
2 term Covid infection. The compassionate release motion is pending before the  
3 Sentencing Court, and Petitioner has been appointed counsel in connection with that  
4 motion.

5 According to the Federal Bureau of Prisons (“BOP”) website, Petitioner is 36  
6 years old and his projected release date is January 26, 2028.

### 7 PETITIONER’S CLAIM

8 The Petition seeks Petitioner’s immediate release from custody based on the  
9 Covid pandemic. Petitioner states that he is challenging the “fact of confinement,”  
10 and not the conditions of his confinement. He asserts that his continued  
11 incarceration violates the Fifth and Eighth Amendments, because there are no  
12 conditions of confinement that would be constitutionally sufficient to keep him safe  
13 from harm in light of the Covid pandemic.

14 The Petition’s allegations are not made under penalty of perjury, and thus,  
15 there is no competent evidence of the matters Petitioner alleges. He does not  
16 contend, in the Petition, that he personally is at high risk from Covid or suffers from  
17 any co-morbidities, but as noted above, he has made such an allegation in his  
18 pending compassionate release motion. Petitioner alleges that FCI-Terminal Island  
19 houses 870 inmates in seven dorm style units, and that the warden has stated that  
20 200 more inmates will be received. He alleges that inmates sleep in bunk beds  
21 within three feet of each other and that there is no air filtering or air conditioning  
22 system in place, only windows and fans. Petitioner alleges that in the dining hall,  
23 tables are one foot apart from each other and all four fixed seats are occupied.  
24 Petitioner contends that this situation constitutes overcrowding.

25 In addition, Petitioner alleges that the BOP, as a general policy, seeks to  
26 encourage the development of herd immunity by housing inmates infected with  
27  
28

1 Covid with those who are not infected. He alleges that this practice started at FCI-  
2 Terminal Island in 2020, and has continued since then.

3 Further, Petitioner alleges that BOP officials in general are only 69.4%  
4 vaccinated and that unvaccinated BOP staff have not been removed. He alleges that  
5 BOP prison officials do not wear masks and that a mask mandate for BOP  
6 employees is not enforced. Petitioner alleges that the masks provided to inmates are  
7 inadequate and do not provide protection. He alleges that FCI-Terminal Island  
8 stopped performing Covid tests during last year's Omicron variant wave and under-  
9 reports Covid positive case numbers.

### 10 DISCUSSION

11 Federal courts have an independent obligation to examine their own  
12 jurisdiction and may not entertain an action in which jurisdiction is lacking.  
13 *Hernandez v. Campbell*, 204 F.3d 861, 865 (9th Cir. 2000). A Section 2241 habeas  
14 petition may be filed by a federal prisoner to attack the "execution of his sentence,"  
15 but not to attack its validity. *White v. Lambert*, 370 F.3d 1002, 1009 (9th Cir. 2004);  
16 *Hernandez*, 204 F.3d at 864.

17 As a threshold matter, the Court notes that there is no evidence before it that  
18 Petitioner has attempted to exercise his administrative remedies with respect to the  
19 matters raised by the Petition. For federal prisoners such as Petitioner, the BOP has  
20 in place an administrative remedy procedure by which inmates can seek formal  
21 review of their complaints regarding any aspect of imprisonment through the  
22 submission of a specified series of administrative remedy requests and forms  
23 upward through the "final administrative appeal" that renders a claim  
24 administratively exhausted. *See* 28 C.F.R. §§ 542.10, 542.13-542.15; *Nigro v.*  
25 *Sullivan*, 40 F.3d 990, 992 (9th Cir. 1994).

26 While Section 2241 does not contain an exhaustion requirement, and thus,  
27 exhaustion is not a jurisdictional prerequisite, for prudential reasons, federal courts  
28

1 require Section 2241 petitioners to exhaust their administrative remedies prior to  
2 seeking habeas relief. *Ward v. Chavez*, 678 F.3d 1042, 1045 (9th Cir. 2012); *Brown*  
3 *v. Rison*, 895 F.2d 533, 535 (9th Cir. 1990); *see also Singh v. Napolitano*, 649 F.3d  
4 899, 900 (9th Cir. 2011); and *Laing v. Ashcroft*, 370 F.3d 994, 997-98 (9th Cir.  
5 2004). Requiring a petitioner to exhaust his administrative remedies aids “judicial  
6 review by allowing the appropriate development of a factual record in an expert  
7 forum,” conserves “the court’s time because of the possibility that the relief applied  
8 for may be granted at the administrative level,” and allows “the administrative  
9 agency an opportunity to correct errors occurring in the course of administrative  
10 proceedings.” *Ruviwat v. Smith*, 701 F.2d 844, 845 (9th Cir. 1983) (*per curiam*).  
11 Dismissal is appropriate when a federal prisoner has not exhausted the  
12 administrative remedies made available by the BOP. *Martinez v. Roberts*, 804 F.3d  
13 570, 571 (9th Cir. 1986) (*per curiam*).

14 Even if Petitioner’s complaints were cognizable under Section 2241, his  
15 apparent failure to exhaust them could serve as a basis for dismissing this action.  
16 The Court, however, declines to rest dismissal on that basis, because there is a more  
17 compelling reason why the Petition should be dismissed, namely that the complaints  
18 alleged are not cognizable under Section 2241.

19 As noted earlier, a Section 2241 habeas corpus petition is a vehicle for a  
20 federal prisoner’s challenge to the execution of his sentence. *Hernandez*, 204 F.3d  
21 at 864. Challenges to a prisoner’s conditions of confinement, however, must be  
22 brought through a civil rights action, rather than through a habeas corpus petition.  
23 *See Badea v. Cox*, 931 F.2d 573, 574 (9th Cir. 1991); *see also Hill v. McDonough*,  
24 547 U.S. 573, 579 (2006) (“[a]n inmate’s challenge to the circumstances of his  
25 confinement” must be brought through a civil rights action); *Muhammad v. Close*,  
26 540 U.S. 749, 750 (2004) (“Challenges to the validity of any confinement or to  
27 particulars affecting its duration are the province of habeas corpus . . . ; requests for  
28

1 relief turning on circumstances of confinement may be presented in a § 1983  
2 action.”) (cit. om.). A civil rights action is the “proper remedy” for a prisoner “who  
3 is making a constitutional challenge to the conditions of his prison life, but not to the  
4 fact or length of his custody.” *Preiser v. Rodriguez*, 411 U.S. 475, 499 (1973); *see*  
5 *also Ramirez v. Galaza*, 344 F.3d 850, 859 (9th Cir. 2003) (habeas jurisdiction is  
6 lacking, and a civil rights action instead is appropriate, “where a successful  
7 challenge to a prison condition will not necessarily shorten the prisoner’s  
8 sentence”). “[C]onstitutional claims that merely challenge the conditions of a  
9 prisoner’s confinement, whether the inmate seeks monetary or injunctive relief, fall  
10 outside of that core [of habeas relief]” and, instead, should be brought as a civil  
11 rights claim “in the first instance.” *Nelson v. Campbell*, 541 U.S. 637, 643 (2004).

12 Petitioner plainly is aware of the above given many of the Petition’s  
13 allegations and his ill-disguised attempts to bring himself within Section 2241’s  
14 jurisdictional framework by insisting that he is challenging the “fact of  
15 confinement.” That assertion, however, is unavailing, because Petitioner’s  
16 allegations indisputably challenge the *conditions* of his confinement. Through his  
17 allegations, Petitioner effectively seeks to pursue a *Bivens* civil rights claim<sup>2</sup> based  
18 on the BOP’s asserted failure to provide adequate social distancing measures,  
19 adequate testing, its adherence to a herd immunity policy, and its failure to adhere to  
20 mask and vaccine mandates and CDC guidelines, thereby allegedly subjecting  
21 Petitioner and other inmates to an undue risk from Covid. Indeed, the Petition states  
22 a classic conditions-of-confinement claim that does not implicate the fact or  
23 duration of Petitioner’s confinement.

24  
25  
26  
27 <sup>2</sup> See *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S.  
28 388 (1971), which applies when civil rights-type claims based on asserted deprivations of  
constitutional rights are asserted against federal officials.

1           The Court recognizes that since the commencement of the Covid pandemic,  
2 numerous prisoners have attempted to obtain habeas-based release from  
3 incarceration based in the pandemic. Despite these numerous lawsuits, whether  
4 prisoner actions asserting violations of constitutional rights based on the Covid  
5 pandemic properly may sound in habeas is not a settled issue at the appellate level.  
6 When the Ninth Circuit last was presented with the question of whether habeas  
7 review is available for claims that Covid conditions at a penal institutional give rise  
8 to unconstitutional conditions of confinement, it declined to resolve the issue. *See*  
9 *Roman v. Wolf*, 977 F.3d 935, 941-42 (9th Cir. 2020) (per curiam). In the absence  
10 of Circuit precedent, numerous district courts within the Ninth Circuit have  
11 concluded that such a claim is not cognizable in habeas review notwithstanding that  
12 the remedy sought is release.

13           In *Alvarez v. Larose*, 445 F. Supp. 3d 861, 866 (S.D. Cal. 2020), federal  
14 criminal detainees and convicted defendants sought Section 2241 habeas relief  
15 based on the alleged failure to implement adequate measures to protect them with  
16 respect to Covid. The Court specifically rejected the petitioners' argument that  
17 because they sought release—a remedy traditionally provided in habeas—they were  
18 entitled to proceed in habeas review, reasoning that this argument improperly  
19 conflated the nature of the relief sought with the substance of the claim, which was  
20 to assert that conditions of confinement were unconstitutional and thus should be  
21 raised in civil rights rather than habeas. *Id.* Similarly, in *Jackson v. City of Twin*  
22 *Falls*, No. 1:21-cv-00013-BLW, 2021 WL 982307, at \*3-\*4 (D. Id. Mar. 16, 2021),  
23 the Court found that a state inmate's Covid-based claim should have been brought in  
24 civil rights rather than habeas. The Court observed that: “[m]erely alleging that no  
25 conditions of confinement could possibly satisfy the Eighth Amendment—an  
26 allegation which every inmate could throw into any habeas corpus petition—does  
27 not magically transform the nature of a conditions-of-confinement claim”; and  
28



1 “[r]equesting release as the remedy for unconstitutional prison conditions does not  
 2 render the substantive conditions-of-confinement claim a challenge to the fact of an  
 3 inmate’s confinement.” *Id.*

4 In this District, in *Wilson v. Ponce*, 465 F. Supp. 3d 1037, 1047-49 (C.D. Cal.  
 5 2020), the Court reviewed the existing caselaw and concluded that inmate claims  
 6 premised on the asserted dangers and risks posed by Covid are not cognizable as  
 7 habeas claims. The Court concluded that federal habeas jurisdiction does not exist  
 8 for a claim that release is required due to the institutional conditions caused by the  
 9 Covid pandemic, because this claim is not an attack on the validity of the prisoner’s  
 10 confinement or the particulars affecting its duration, the factors needed for habeas  
 11 jurisdiction to exist. With one exception noted below, Courts in this District  
 12 consistently have drawn the same conclusion and dismissed habeas actions seeking  
 13 release based on claims that an inmate’s confinement during the Covid pandemic  
 14 violated his Fifth and/or Eighth Amendment rights, finding that the claims should be  
 15 raised by way of a civil rights action and cannot be raised through a Section 2241  
 16 petition. *See, e.g., Miller v. Ponce*, No. CV 21-06985-MCS (DFM), 2022 WL  
 17 943056, at \*2 (C.D. Cal. Feb. 8, 2022), *accepted by* 2022 WL 910948 (Mar. 28,  
 18 2022) (agreeing with earlier cases finding that habeas relief is not available for  
 19 claims such as that brought here by Petitioner); *Camillo-Amisano v. Ponce*,  
 20 No. 2:21-cv-00072-ODW (JDE), 2021 WL 3377237, at \*4-\*5 (C.D. Cal. June 22,  
 21 2021), *accepted by* 2021 WL 3371537 (Aug. 3, 2021) (collecting Central District  
 22 cases and finding that habeas jurisdiction is unavailable); *Bruno v. Warden*,  
 23 No. CV 20-6390 JFW (PVC), 2021 WL 2323941, at \*6 (C.D. Cal. May 14, 2021),  
 24 *accepted by* 2021 WL 2313657 (C.D. Cal. June 7, 2021) (concluding that “claims by  
 25 federal prisoners seeking release from confinement based on conditions caused by  
 26 the COVID-19 pandemic must be brought through a *Bivens* action”); and *Tims v.*  
 27 *Von Blanckensee*, No. CV 20-7986-ODW (JEM), 2021 WL 769692, at \*2 (C.D.



1 Cal. Jan. 26, 2021), *accepted by* 2021 WL 765417 (Feb. 26, 2021) (“to the extent  
 2 Petitioner argues that his continued incarceration violates his Fifth and Eighth  
 3 Amendment rights and seeks a sentence of time served due to the conditions of  
 4 confinement implemented during the COVID-19 pandemic . . . , his ‘request for  
 5 relief exceeds the Court’s jurisdiction under Section 2241’ and must be dismissed”)  
 6 (citation omitted).<sup>3</sup>

7 On the other hand, some District Courts have found that these types of Covid-  
 8 19 conditions of confinement claims are cognizable on habeas review. *See, e.g.,*  
 9 *Torres v. Milusnic*, 472 F. Supp. 3d 713, 724-26 (C.D. Cal. 2020) (finding  
 10 Section 2241 jurisdiction to exist when the petitioners’ claims sought relief from  
 11 Covid-related conditions at their institution by challenging the “‘fact and duration of  
 12 confinement on the basis that no set of conditions of confinement under the present  
 13 circumstances could be constitutional’”; reasoning that such a claim challenges the  
 14 “‘fact of confinement’ for habeas purposes); *Bent v. Barr*, No. 19-cv-6123-DMR,  
 15 2020 WL 3640009, at \*2 (N.D. Cal. July 6, 2020) (granting a preliminary injunction  
 16 and finding that habeas jurisdiction existed over claim that challenged the validity of  
 17 confinement in light of the Covid pandemic).

18 As Petitioner notes, in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1862-63 (2017), the  
 19 Supreme Court appeared to leave open the possibility that federal detainees seeking  
 20 class action injunctive relief might be able to raise a conditions-of-confinement  
 21 claim under Section 2241, stating, “we have left open the question whether [federal  
 22 detainees] might be able to challenge their confinement conditions via a petition for  
 23 a writ of habeas corpus.” That mere possibility, however, does not open the door  
 24

---

25 <sup>3</sup> *See also, e.g., Lustig v. Warden, FCI Lompoc*, No. CV 20-3708-SB (AGR), 2021 WL  
 26 1164493, at \*1 (C.D. Cal. Jan. 4, 2021), *accepted by* 2021 WL 1164474 (Mar. 26, 2021); *Macias*  
 27 *v. Bradley*, No. 20-7114-RGK, 2020 WL 6681250, at \*3 (C.D. Cal. Nov. 10, 2020); *Jackson v.*  
 28 *Von Blanckensee*, No. CV 20-4161 PA, 2020 WL 4905527, at \*1 (C.D. Cal. Aug. 19, 2020);  
*Sweeney v. Herrera*, No. CV 20-0427-CJC, 2020 WL 4980062, at \*2 (C.D. Cal. June 8, 2020).

1 here to habeas relief for Petitioner’s Covid-related allegations. As one District  
2 Court explained, even if, *arguendo*, it might be possible for a federal prisoner to  
3 raise a conditions-of-confinement claim under Section 2241 as the Supreme Court  
4 may have suggested in *Abbasi*, the remedy is a narrow one that would not apply to  
5 the Covid pandemic situation:

6 Certainly, Petitioners’ Eighth Amendment claims [seeking release from  
7 federal custody because of the conditions created by the Covid  
8 pandemic] sound more in the nature of the type of habeas claim the  
9 Supreme Court in *Preiser* hypothesized, but has yet to recognize:  
10 “[w]hen a prisoner is put under additional and unconstitutional restraints  
11 during his lawful custody, it is arguable that habeas corpus will lie to  
12 remove the restraints making the custody illegal.” The Supreme Court  
13 resurrected this idea more recently in *Abbasi*. Yet, although the  
14 petitioners in *Abbasi* alleged they were held in tiny, empty, constantly  
15 lighted cells for over 23 hours per day without basic hygiene, and  
16 subjected to physical abuse, including broken bones, and verbal abuse,  
17 including sexual and religious insults, the Supreme Court did not find it  
18 was such a case for habeas relief “to remove the restraints making the  
19 custody illegal.” *Abbasi*, 137 S. Ct. at 1853. The Court’s decision is  
20 telling of just how extraordinary the case must be for habeas jurisdiction  
21 to lie before a prisoner may be released from lawful custody based on a  
22 condition of confinement.

23 *Wragg v. Ortiz*, 462 F. Supp. 3d 476, 504 (D. N.J. 2020) (declining to find a Section  
24 2241 habeas case based on the Covid pandemic “to be that ‘extraordinary case’  
25 where it should expand habeas jurisdiction, more extraordinary than even *Abbasi*,  
26 where the Supreme Court did not see fit to extend habeas jurisdiction over a  
27  
28

1 conditions of confinement claim involving outright alleged physical abuse of  
2 prisoners who were not serving a sentence upon conviction of a crime”).

3 This issue remains to be resolved at the Circuit Court or Supreme Court level.  
4 Until then, this Court joins with the vast weight of authority in this District finding  
5 that claims by federal prisoners seeking release from confinement based on  
6 conditions caused by the Covid pandemic may not be raised through a Section 2241  
7 habeas action. Petitioner’s conclusory allegation that there are no conditions of  
8 confinement that could prevent constitutional violation does not alter the Court’s  
9 conclusion. There is nothing alleged in the Petition to support a finding that  
10 immediate release from an existing, valid conviction and sentence imposed by  
11 another federal court is the only relief appropriate here and that only habeas review  
12 will suffice. *See Camillo-Amisano*, 2021 WL 3377237, at \*5. There very well may  
13 be relief that could be fashioned short of release, but in any event, any such possible  
14 relief would be more appropriately considered in a civil rights case. Petitioner’s  
15 contention that FCI-Terminal Island officials are not taking adequate preventative  
16 measures to reduce the risk of Covid, if eventually factually supported (which it is  
17 not here), can be addressed and remedied in a civil rights action through which  
18 various types of relief may be ordered, unlike in a habeas action. *See Douglas v.*  
19 *Jacquez*, 626 F.3d 501, 504 (9th Cir. 2010) (“The power of a federal habeas court  
20 ‘lies to enforce the right of personal liberty’ . . . [and as] such, a habeas court ‘has  
21 the power to release’ a prisoner, but ‘has no other power.’”) (citations omitted).  
22 While Petitioner asserts constitutional violations arise from his conditions of  
23 confinement during the Covid pandemic, he provides “no authority under which  
24 such a violation would justify immediate release, as opposed to injunctive relief that  
25 would leave [Petitioner] detained while ameliorating any alleged violative  
26 conditions within the [prison].” *Dawson v. Asher*, 447 F. Supp. 3d 1047, 1050-51  
27 (W.D. Wash. 2020); *see also Martinez Franco v. Jennings*, 456 F. Supp. 3d 1193,  
28

1 1200 (N.D. Cal. 2020) (with respect to immigration detainee’s contention that the  
 2 lack of social distancing during the Covid pandemic violates the Constitution and he  
 3 therefore should be released from custody, finding that the appropriate remedy is an  
 4 injunction ordering social distancing, “not releasing detainees who request a  
 5 [temporary restraining order] on a first-come, first-serve basis”).

6 Finally, there is an obvious circumstance that precludes finding persuasive  
 7 Petitioner’s argument that only immediate release from incarceration to be granted  
 8 by way of habeas relief will suffice. Petitioner has another obvious remedy that not  
 9 only is available but has been exercised, namely, his motion for compassionate  
 10 release pending in the Sentencing Court. Petitioner raises therein the same asserted  
 11 basis for release that he asserts here, namely, the asserted risk he faces due to the  
 12 Covid pandemic. Petitioner has had counsel appointed to represent him in  
 13 connection with that motion and the Sentencing Court is the more appropriate venue  
 14 for deciding whether release is warranted and, in particular, the specific conditions  
 15 of release that should apply to Petitioner.

16 Accordingly, the Court finds that the matters alleged through the Petition may  
 17 not be considered on Section 2241 habeas review. The Court may construe a flawed  
 18 habeas petition as a civil rights complaint. *See Wilwording v. Swenson*, 404 U.S.  
 19 249, 251 (1971). Doing so would be improper here, however, given that: (1) the  
 20 Petition was not accompanied by the \$350 filing fee or a request to proceed without  
 21 prepayment of the full filing fee; (2) the Petition was not accompanied by an  
 22 authorization by Petitioner to have the \$350 filing fee deducted from his trust  
 23 account pursuant to 28 U.S.C. § 1915(b)<sup>4</sup>; and (3) there is no reason to believe that  
 24  
 25

---

26  
 27 <sup>4</sup> Petitioner is a prisoner, and thus, 28 U.S.C. § 1915(b) requires him to pay “the full amount  
 28 of a filing fee,” although he may do so through an initial partial payment and monthly payments  
 thereafter rather than prepaying the entire amount.

Petitioner has exhausted his administrative remedies for his claim, a prerequisite to filing a *Bivens* civil rights action.<sup>5</sup>

In addition, if the Petition were converted to a *Bivens* complaint, Petitioner would be obligated to pay the \$350 filing fee for a civil action, either in full up front or through withdrawals from his prison trust account in accordance with the availability of funds. *See* 28 U.S.C. § 1915(b). The dismissal of this action at the pleading stage or otherwise would not end Petitioner's obligation to pay that \$350 filing fee. Further, the Court would be obligated to screen the converted Petition pursuant to the screening provisions of the Prisoner Litigation Reform Act of 1995. *See* 28 U.S.C. § 1915A(b); 42 U.S.C. § 1997e(c)(1). If the converted Petition ultimately were dismissed for failure to state a claim upon which relief may be granted, that dismissal could count as a "strike" against Petitioner for purposes of 28 U.S.C. § 1915(g). Whether or not Petitioner wishes to risk that possibility, as well as incur the full filing fee, are decisions he should make, not have decided for him.

Thus, the Court believes it is appropriate to dismiss the Petition without prejudice. Petitioner then may determine whether or not he wishes to raise the subject-matter of the Petition through a *Bivens* claim pleaded in a properly-submitted civil complaint. In making that decision, Petitioner must take into account the administrative exhaustion requirement and remember that he must either submit the \$350 filing fee with his complaint or submit the necessary 28 U.S.C. § 1915 documents and pay the \$350 filing fee over time if granted leave to do so.

Accordingly, for the foregoing reasons, it is hereby ORDERED as follows:

1. The Petition is **DISMISSED without prejudice**.


---

<sup>5</sup> 42 U.S.C. § 1997e(a) provides that: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." Section 1997e(a) requires exhaustion "irrespective of the forms of relief sought and offered through administrative avenues." *Booth v. Churner*, 532 U.S. 731, 741 n.6 (2001).

1           2.     Judgment shall be entered **DISMISSING** this action **without**  
2 **prejudice.**

3           **IT IS SO ORDERED.**

4  
5 DATED: April 25, 2022



6 JOHN W. HOLCOMB  
7 UNITED STATES DISTRICT JUDGE

8 PRESENTED BY:

9  
10 

11 GAIL STANDISH  
12 UNITED STATES MAGISTRATE JUDGE  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28